IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 171 OF 1999

Goodlass Nerolac Paints Limited,]
a Public Limited Company,]
registered under the Companies Act,]
1956, having its Registered Office] PETITIONER
at Nerolac House, P.O. Box 16322]
Ganpatrao Kadam Marg,]
Lower Parel, Mumbai - 400 013]

Versus

1) Shri. Anand Shivram Samant]
19-B, Shreyas Colony,]
Aarey Road, Goregaon (East)]
Mumbai - 400 063]
]
2) Mr. V.L. Kamble] RESPONDENTS
Member Industiral Court, Bombay]
having his office at]
Arun Chambers, 7th Floor, Tardeo]
Mumbai - 400 034]

Mr. C.V. Singh with Mahesh Londhe i/by Sanjay Udeshi & Co. for Petitioner.

Mr. V.K. Pradhan for the Respondents.

CORAM : DR. D.Y. CHANDRACHUD, J.

DATE : 22ND AUGUST, 2006

P.C.

1) This petition is filed under Article 226 of the Constitution of India against an award of the Industrial Court dated 14th December 1998. The Industrial Court has while allowing a revision against an order of the Labour Court dismissing a complaint of unfair labour practices directed the Petitioner to grant reinstatement, continuity of service and full back wages with effect from 4th July, 1989 to the first respondent.

2) The first respondent moved a complaint of unfair labour practices under Items 1(a), (b), (d) and (f) of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, on 11th July 1989. The claim of the First respondent was that he was in the employment of the Petitioner for a period of fourteen months from 19th February 1988 to 4th July 1989 in the capacity of a Clerk. The first respondent stated that he was working at the Head Office of the management at Lower parel from the date on which he joined service until his termination on 4th July, 1989. The contention of the first respondent was that he had worked with the

Petitioner uninterruptedly for more than 480 days. He contended that the termination of his service without complying with the provisions of Section 25(F) of The Industrial Disputes Act, 1947 amounted to an unfair labour practice.

3) The defence of the Petitioner to the case of the first Respondent was that after the management lifted the lock out which had been declared on 20th March 1987, on 19th June 1987,the Accounts Department was required to induct some temporary hands to help the regular staff in August 1988. Hence it was submitted that the first respondent was recruited to meet the exigencies of work in August 1988 and that he was not engaged after March 1989. The case of the first respondent that he was engaged between 19th February 1988 till 4th July 1989 was denied. The written statement as originally filed, would hence show that the case of the management was that (i) the First Respondent was amongst the "temporary hands" inducted to help the regular staff and (ii) the First Respondent has worked between August 1988 and March 1989. Over a year later, the Written Statement was amended to set up the plea that the first respondent was in fact engaged as an Apprentice in August 1988 and that his apprenticeship was discontinued in the month of March 1989. The Petitioner also pleaded the case in the amended written statement that the first respondent had actually attended work for 228 days during the period

of 8 months; and that he was on leave for 10 days during the month of September 1988. Hence, according to the Petitioner, the first respondent was paid a 'stipend' for 238 days during the period of 8 months between August 1988 and March 1989 calculated at the rate of Rs.500/- per month.

4) Evidence was adduced on behalf of the management and the workmen. By its Order dated 13th May 1998 the Labour Court came to the conclusion that there was no evidence to establish that the first respondent was in the employment of the Petitioner during the wider period between 19th February 1988 and 4th July 1989. Before the Labour Court, it was urged that even if the first respondent was not in uninterrupted service for the period between February 1988 and July 1989 the workman would still complete a period of 240 days between August 1988 and March 1989 during which the employer admitted that the workman was employed. The Labour Court declined to accept the plea though it held as a matter of fact that the first respondent had rendered service for a period of more than 243 days in the preceding 12 calandar months on the ground that the plea of the workman was that he had worked between February 1988 and July 1989. The Labour Court in the circumstances declined to rely upon the admission of the management to the effect that the first respondent had worked between August 1988 and March 1989 and the complaint was dismissed.

5) When the matter was carried by the first respondent before the Industrial Court in Revision, the Court made a reference to the defence of the Petitioner that the complainant- workman was in employment from 1st August 1988 to 31st March 1989. The total working days for this period were 243 including paid holidays and leave. The Industrial Court held that once the management has admitted that the first respondent was in its employment continuously for a period of 243 days, the termination of his service without complying with the provisions of Section 25(F) of the Industrial Disputes Act, 1947 was unlawful. On this foundation, the Industrial Court granted an order of reinstatement with back wages and continuity of service.

6) The present petition was instituted by the management on 12th January 1999 to challenge the order of the Industrial Court. The first respondent also filed a petition under Article 226 of The Constitution, to impugn the correctness of the finding recorded by the Industrial Court in so far as it had not held that the first respondent was in continuous service from 19th February 1988 to 4th July 1989. A learned Single Judge of this Court dismissed the petition filed by the first respondent (W.P. 276 of 1999) by an order dated 15th March 1999.

7) On behalf of the Petitioner, it has been

submitted that :

(i) The case of the first respondent was that he was in continuous and uninterrupted service for a period of 14 months;

(ii) The defence of the management was required to be read as a whole and thus construed, it was the case of the management that while the first respondent had been engaged during the period between August 1988 and March 1989, the actual period for which the first respondent had worked was 228 days, with 10 days of paid leave. The total number of days worked -238 fell short of the benchmark of 240 days required for the applicability of Section 25F by two days;

(iii) There was no worthwhile cross examination of the witness who deposed on behalf of the management;

(iv) The workman did not adduce any evidence to establish that he had actually worked for a period of 240 days.

8) On the other hand on behalf of the first respondent, the finding that was arrived at by the Industrial Court was supported on the basis that the

case of the management itself was that the workman had worked between August 1988 and March 1989. Learned Counsel submitted, relying on the Judgment of the Supreme Court in Workmen of American Express International Banking Corporation Vs. Management of American Express International Banking Corporation. A.I.R. 1986 SUPREME COURT 458 that the days on which the Petitioner was in employment and was paid wages must be included in computing the period of 240 days for the purposes of Section 25(B). On the facts as admitted by the management, the first Respondent has completed 240 days, that being the period for which he has actually worked as laid down by the Supreme Court in American Express.

9) While considering the tenability of the rival submissions, it would be material to advert to the provisions of Section 25(B) of the Industrial Disputes Act, 1947. Clause 1 of Section 25-B of the Act provides a definition of the expression "Continuous service" for the purposes of Chapter VA. Clause 1 applies to a situation where a workman is in uninterrupted service for the specified period, including service which may be interrupted on account of specified reasons. Clause 2 on the other hand applies to a situation where a workman is not in continuous service within the meaning of Clause (1) for a period of one year or six months in which case he is deemed to be in continuous service so long as, during a

period of 12 calendar months preceding the date with reference to which the calculation has to be made, he has actually worked under the employer for atleast the stipulated period. Other than in the case of a mine, in the generality of cases that period is 240 days. Section 25(B) of the Act provides as follows :

> "Section 25-B. Definition of continuous service - For the purposes of this Chapter, -
>
> (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lockout or a cessation of work which is not due to any fault on the part of the workman;
>
> (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continous service under an employer-
>
> (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be

made, has actually worked under the employer for not less than -

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case;

(b) for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than -

(i) ninety-five days, in the case of a workman employed below ground in a mine; and

(ii) one hundred and twenty days, in any other case.

10) Now, it is a well settled principle of law that Clauses (1) and (2) of Section 25(B) operate in different fields. Under Clause (1) the workman shall be said to be in continuous service for a period if he

is in uninterrupted service for that period. In Surendranagar District Panchayat v. Dahyabhai Amarsinh AIR 2006 SUPREME COURT 110 (at para 9, page 113), The Supreme Court has emphasised the distinction between Sub Section 1 and Sub Section 2 in the following observations :

> "Thus the workman shall be said to be in continuous service for one year, that is for twelve months irrespective of the number of days he has actually worked with interrupted service permissible under Section 25(B). However, the workman must have been in service during that period that is not only on the date when he actually worked but also on the days he could not work under the circumstances set out in Clause (1)".

The Court held that the import of sub-section (1) of Section 25(B) is that the workman should be in the employment of the employer for a continuous, uninterrupted period for one year except the period of absence that is permissible as mentioned therein. On the other hand, Sub Section (2) of Section 25(B) introduces a fiction to the effect that even if the workman is not in continuous service within the meaning of Clause (1) of Section 25(B) for the period of one

year or, six months, he shall be deemed to be in continuous service for that period under an employer if he has actually worked for the days specified in sub clauses (a) and (b) of Clause (2). In other words if the workman has actually worked for atleast 240 days with his employer, immediately prior to the date of retrenchment, he shall be deemed to have served with the employer for a period of one year to get the benefit of Section 25(F).

11) The onus of proof of establishing the fact that a workman has worked for a period of 240 days in the immediately preceding period of 12 calendar months lies on the workman. This principle was inter alia affirmed in the Judgments of the Supreme Court in M/s Essen Deinki v. Rajiv Kumar, AIR 2003 SC 38 R.M. Yellatti v. Asstt. Executive Engineer (2006) 1 SCC 106 and ONGC Limited and another v. Shyamal Chandra Bhowmik (2006) 1 SCC 337. In Bank of Baroda Vs. Ghemarbhai Harjibhai Rabari (2005) 10 SCC 792, the Supreme Court dealt with the question of onus of proof. The Bench of three Learned Judges held that :

> " While there is no doubt that the burden of proof that the claimant was in the employment of a management primarily lies on the workman who claims to be a workman, the degree of proof so required, would vary from case to case".

. In O.N.G.C. Vs. Shyamal Chandra Bhowmick (2006) 1 SCC 337 the Supreme Court held that the question of shifting the onus of proof arises when evidence is led.

12) Now, in the present case the pleading of the workman in the complaint of unfair labour practices was that he was in uninterrupted service from February 1988 until July 1989. The workman pleaded that he was a regular employee in uninterrupted service for more than 480 days. The Management filed its written statement in which the defence that was taken was that it had recruited temporary hands to meet the exigencies of work in August 1988 and the workman had not been engaged after March 1989. The Management produced before the Labour Court a monthly Muster Book, Wage Register and Statement showing the number of days that had been worked by the complainant from August 1988 to March 1989. According to the Management, the workman was also entitled to ten days of Paid leave, as a result of which he had worked for total of 238 days between August 1988 and March 1989. The contention of the first respondent was that he had worked for a much longer period between February 1988 and July 1989, but on that part of his case, it has been found that as a matter of fact he had worked between August 1988 and March 1989. The Petition filed by the first respondent to challenge the finding against him on that part

having been dismissed, this Court has to proceed on the basis that the total length of service is between 1st August 1988 and 31st March 1989.

13) Even if a workman fails to establish an entitlement under Clause 1 of Section 25(B) that does not deprive him of the provision made in the law of the benefit of the deeming fiction under Clause 2 of Section 25(B). In fact, Clause 2 of Section 25(B) creates a deeming fiction in a case where a workman is not in continuous service within the meaning of clause 1 provided that he has actually worked for a period of atleast 240 days as laid down in Sub Clause a(ii) of Clause 2. The facts in so far as the present case is concerned are not disputed. The admitted position is that the workman in the present case was in service between 1st August 1988 and 31st March 1989 and that he was paid for the entire length of this duration. This position is not disputed in this Court as well. The Management however sought to submit that the workman failed to attain the benchmark of rendering actual work of 240 days by a period of 2 days in the total number of days for which the workman had actually worked.

14) Whether the Management is justified in this defence would turn upon the Judgment of the Supreme Court in Workmen of American Express International Banking Corporation v. Management of American Express International Banking Corporation. AIR 1986 SC 458.

Before the Supreme Court in that case the words "actually worked under the employer" came up for consideration. The Management sought to submit that only the grounds of absence which are stipulated in the explanation to Section 25(B)(2) should be taken into account for the purpose of calculating the days on which the workmen had "actually worked" though he had not so worked and no other days. The Supreme Court specifically rejected the submission and held as follows :

> "5. Section 25-F of the Industrial Disputes Act is plainly intended to give relief to retrenched workmen. The qualification for relief under S. 25-F is that he should be a workman employed in an industry and has been in continuous service for not less than one year under an employer. What is continuous service has been defined and explained in S.25-B of the Industrial Disputes Act. In the present case, the provision which is of relevance is S.25-B(2)(a)(ii) which to the extent that it concern us, provides that a workman who is not in continuous service for a period of one year shall be deemed to be in continuous service for a period of one year if the workman during a period of twelve calendar months preceding the

date with reference to which the calculation is to be made, has actually worked under the employer for not less than 240 days. The expression which we are required to construe is actually worked under the employer. This expression, according to us, cannot mean those days only when the workman worked with hammer, sickle or pen, but must necessarily comprehend all those days during which he was in the employment of the employer and for which he had been paid wages either under express or implied contract of service or by compulsion of statute, standing orders etc. The learned counsel for the Management would urge that only those days which are mentioned in the Explanation to S. 25-B(2) should be taken into account for the purpose of calculating the number of days on which the workman had actually worked though he had not so worked and no other days. We do not think that we are entitled to so constrain the construction of the expression 'actually worked under the employer'. The explanation is only clarificatory,as all explanations are, and cannot be used to limit the expanse of the main provision. If the expression 'actually worked under the employer' is capable of comprehending the days during which the workman was in employment and was paid wages - and we see no

impediment to so construe the expression - there is no reason why the expression should be limited by the explanation. To give it any other meaning then what we have done would bring the object of S.25-F very close to frustration. It is not necessary to give examples of how S.25-F may be frustrated as they are too obvious to be stated." (emphasis supplied).

15) Counsel appearing on behalf of the Management sought to distinguish the Judgment of the Supreme Court by submitting that the question which arose for consideration in that case was whether Sundays and other holidays for which wages are paid under the law or, by contract should be treated as days on which the employee actually worked under the employer for the purposes of Section 25(F) read with Section 25(B). The attempt on the part of the Management to restrict the ambit of the ratio cannot simply be countenanced by this Court. While dealing with the issue which arose before it for consideration, the Supreme Court considered the meaning of the expression ‘actually worked’ under the employer under Section 25(B)(2). The Supreme Court held that this expression cannot mean only those days when the workman had worked "with hammer, sickle or pen", but "must necessarily comprehend all those days during which he was in the employment of the employer and for which he had been

paid wages". If the ratio is applied to the present case what emerges is an admitted position before the Court that (i) the first respondent was in the employment of the Petitioner between 1st August 1988 and 31st March 1989; and (ii) he had been paid wages for the entire duration of this period. The workman was in continuous service for a period in excess of one year. The contention of the Petitioner that the first respondent did not establish his case of having actually worked for 240 days is not correct because in so far as the facts of the case are concerned, it is admitted by the Petitioner that the contract of employment with the first respondent was valid between 1st August 1988 and 31st March 1989 and that the workman was paid during that period. The termination was without complying with Section 25F.

. In the present case the material fact that the workman was engaged during August 1988 and March 1989 is admitted. So also that he was paid for the entire length of that period. The question was whether the employer was entitled to deduct two days out of the admitted period of engagement though the workman was paid for that period and the contract of employment covered that period. The decision in American Express requires the Court to answer the question with only one and one answer : Plainly not. The First Respiondent has "actually worked with the employer" for a period in excess of 240 days.

16) At this stage, it would be necessary to note the conduct of the employment. During the pendency of the proceeding before this Court, the Management filed an Affidavit of its Personnel Manager, Arvind Vyankatesh Bedekar inter alia to buttress the case that the first respondent had not worked for a continuous period of 240 days. The Management produced an alleged receipt dated 16/4/1989, for Rs.330/- stated to be paid to the first respondent by way of stipend for the month of March 1989. However the management stated that it was realised that the first respondent did not have the facility of leave as he was an Apprentice; that this was clarified to him and he was called upon to refund the excess payment which the workman did. The workman has filed an Affidavit to controvert the case of the Management and the affidavit clearly establishes the falsity of the contention of the management. The workman has stated in his Affidavit that the receipt which is relied upon by the Management is fabricated. The workman has stated that the Revenue stamp which is annexed to the receipt is in the amount of Rs.1/- whereas in the year 1989 in which the receipt purports to be executed a Revenue Stamp of 20 Paise was required under the provision of the Indian Stamp Act. The said provision was changed only in the year 1998. Moreover, the payment which was made to the workman was Rs.500/- per month. In that event salary for 10 days leave would have been Rs.170/- and not Rs.330/- and there was

no question on his part to refund an amount of Rs.330/- to the Management.

17) A serious note has to be taken of the conduct of the Management in the present case. From the record it emerges that a fabricated document has been produced before the Court to defeat the just entitlement of the workman. In fact, the entire conduct of the Management follows a consistent pattern which buttresses a lack of probity in the conduct of the proceeding in the Labour Court. In the written statement which had originally been filed the defence which was taken up was not that the workman was recruited as an Apprentice, but that since there was a temporary exigency of work "some temporary hands were taken in the Accounts Department to help the regular staff to do the Audit work". The written statement was filed on 16th November 1989. An application for amendment of the written statement was made on 13th December 1990 over one year after the filing of the written statement in which a defence was taken that the workman was taken as an Apprentice in August 1988. The workman in his evidence denied that he had been recruited as an Apprentice. The witness of the Management, Shri. P.M. Lokur who was working as Assistant Manager in the Accounts Department stated that he had learnt from Mr. Rangnekar, another Officer, about the terms and conditions of the appointment of the workman in June/July 1988. However, the witness was then confronted with the fact that

according to the Management the workman was not in employment in June-July 1988. The witness stated that he was not aware as to whether any apprenticeship agreement was in existence between the workman and Company; he was unaware of the apprenticeship period of the workman and he was unable to state whether any letter was addressed to the Advisory Board. The witness was specifically questioned as to why the original written statement was silent on the alleged appointment of the first respondent as an Apprentice to which he stated that he and the Personnel Manager were suffering from a 'mis-understanding' at the time of the filing of the first written statement and consequently there was no mention of the fact that the complainant was appointed as an Apprentice. It is, therefore apparently clear that the defence that the first respondent was appointed as an Apprentice was an after thought. The defence was not taken in the original written statement and was thereafter set up only to find some answer to the contention of the workman. The defence is patently false and is not established on the evidence on record.

18) For all these reasons, I am of the view that the conclusion that has been arrived at by the Industrial Court to the effect that the first respondent had worked for 240 days between 1st August 1988 and 31st March 1989 is unexceptionable and does not warrant interference under Article 226 of the

Constitution. The Labour Court had also entered a finding of fact that the first respondent worked for 243 days, but was erroneously of the view that it was disabled from considering the plea of the workman merely on the ground that the workman had set up a wider entitlement of service for a continuous period of more than one year. The Industrial Court has in revision corrected the error for cogent reasons.

19) Recent judgments of the Supreme Court have emphasised that an order of full back wages should not be passed automatically or mechanically merely on the ground of reinstatement. In U.P. State Brassware Corpn. Ltd. and another Versus Uday Narain Pandey (2006) 1 SCC 479, the Supreme Court held that though a direction to pay full back wages on a declaration that the order of termination was invalid used to be the usual result, now with the passage of time, a pragmatic view of the matter is being taken by the Court realising that an industry may not be compelled to pay the workman for the period during which he has apparently contributed little or nothing at all to it and/or for a period that was spent unproductively as a result whereof the employer would be compelled to go back to a situation which prevailed many years ago, namely, when the workman was retrenched.

20) In the present case the evidence on the record shows that the first respondent was employed at

different points of time. In his Affidavit before this Court dated 21st April 2003, the first respondent has stated that between March 1993 till January 1997 he was working with Orkay Industries; for two years he was drawing Rs.1500/- and thereafter a salary of Rs.2500/- per month. It would be also appear that between 2nd April 1999 and 1st June 2001 the first respondent was appointed by M/s Blue Chip Computers and was drawing Rs.4500/- per month. Having regard to the fact that the first respondent has been employed during the period to which the controversy in the present case relates, full back wages cannot be granted. At the same time the Court must have due regard to the fact that the conditions of service to which the workman would have been entitled had his services not been unlawfully terminated would be substantially better than the employment in which he was engaged. Counsel for the management stated on instructions that the present salary of the First Respondent, had he continued in service would have been about Rs.15,000/- per month. I am of the view that an order of reinstatement with back wages quantified 25% would meet the ends of justice. The Order of the Industrial Court granting full back wages shall accordingly stand modified to the aforesaid extent. The direction in regard to the grant of reinstatement with continuity of service is confirmed. The petition shall stand disposed of in the aforesaid terms. The Petitioner shall comply with the directions contained in this

order within four weeks from today. There shall be no order as to costs.

(DR. D.Y. CHANDRACHUD, J.)